90-214

No. _____

IN THE

Supreme Court of the United States

October Term, 1989

CHARLES A. FAHRIG and SHIRLEY A. FAHRIG,
Petitioners,

vs.

THE HONORABLE RICHARD S. DODGE, JUDGE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

PETITION FOR WRIT OF CERTIORARI

CHARLES A. FAHRIG
SHIRLEY A. FAHRIG
27 Loganwood Drive
P.O. Box 522
Centerville, Ohio 45459
Telephone: (513) 433-0546
Petitioners, Appearing Pro Se

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED FOR REVIEW

I. Whether a summary dismissal on November 23, 1988 at 3:53 P.M. by a state court of appeals of petitioners' original action, a complaint for writ of mandamus filed in the state court of appeals, upon the filing by the respondent the day before on November 22, 1988 at 10:42 A.M. of a motion to dismiss which included an attached exhibit, and which motion was based on Ohio Civ. R. 12(B)(6), on the ground that the complaint stated no cause of action; and further, whether this summary dismissal, rendered without first permitting petitioners an opportunity to respond to the motion to dismiss, either orally or in writing as permitted by the appellate and civil rules, is a denial of 'due process' of law and of the 'equal protection of the laws' as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

Ohio Civ. R. 12(B)(6) SEE App. A25.

II. Whether a dismissal rendered without opinion by the supreme court of the state of petitioners' direct appeal as of right of the summary dismissal by the court of appeals of petitioners' complaint for writ of mandamus, which had been dismissed by the court of appeals upon the filing of a motion to dismiss which included an exhibit, and which motion was based on Ohio Civ. R. 12(B)(6), on the ground that the complaint stated no cause of action, and to which motion to dismiss these petitioners were deprived of the opportunity to respond, either orally or in writing, as permitted by the appellate and civil rules; and further, whether this dismissal by the supreme court of the state, without first granting these petitioners a trial *de novo*, or without first fully reviewing petitioners' 'Brief' duly filed in the case, or without first granting the petitioners an oral hearing or a

full review of the 'Record' duly filed in the case, is a denial of 'due process' and 'equal protection of the laws' as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

Ohio Civ. R. 12(B((6) SEE App. A25.

III. Whether a dismissal decision and entry by the second appellate district state court of appeals bearing the names of only two appellate judges when the state statute, O.R.C. 2501.013 and the state constitution, Article IV, Section 3, require that "three judges shall participate in the hearing and disposition of each case . . .", and which dismissal rendered by only two appellate judges is thereafter sustained by the supreme court of the state, is a denial of 'due process of law' and of the 'equal protection of the laws' as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

O.R.C. 2501.013 SEE App. A11.

O. Const. Article IV, Section 3 SEE App. A8.

IV. Whether the two refusals by the state supreme court on November 15, 1989 and December 20, 1989 to permit instanter eighteen (18) copies of a 'Brief' which had been accepted and filed by its clerk of court twenty-eight (28) days before and date-stamped by her on October 18, 1989 and after the 'Record' had been duly filed and accepted by the clerk of court and date-stamped by her on July 10, 1989, and whether the refusal to grant petitioners a hearing on the merits pursuant to Supreme Court Rule VII, Section 2 or a trial *de novo* are a 'gross abuse of discretion' since these petitioners had been denied a 'hearing' on, or an opportunity to respond to, respondent's motion to dismiss in the court of appeals, the court of first instance; and further, whether said

refusals are a denial of the 'due process of law' and of the 'equal protection of the laws' as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

Ohio Supreme Court Rule VII, Section 2 SEE App. A14.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

QUESTION NO. 1 i

QUESTION NO. 2 i

QUESTION NO. 3 ii

QUESTION NO. 4 ii

JUDGMENTS BELOW 2

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED 3

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND TREATISES INVOLVED IN CASE 5

STATEMENT OF CASE 7

ARGUMENT 12

CONCLUSION 17

APPENDIX:

Entry of Supreme Court of Ohio, November 15, 1989 ..... A1

Decision and Entry of Court of Appeals, November 23, 1988 ..... A2

Entry of Supreme Court of Ohio, December 20, 1989 ..... A6

Entry of Supreme Court of Ohio, December 20, 1989 ..... A7

Constitutions A8

Statutes A11

Supreme Court of Ohio Rules A14

Ohio Appellate Rules A16

Ohio Civil Procedure Rules A25

Ohio Common Pleas Court Rules A27

First Page Motion to Dismiss Filed in Court of Appeals November 22, 1988 ..... A28

First Page Record Filed in Supreme Court of Ohio July 10, 1989 ..... A30

First Eleven Pages Brief Filed in Supreme Court of Ohio October 18, 1989 ..... A32

TABLE OF AUTHORITIES

Armstrong v. Manzo, 380 U.S. 545, 14 L.Ed.2d 62, 66, 85 S. Ct. 1187 (1965) 13

Barr v. City of Columbia, 378 U.S. 146, 149 (1964) 14

Board of Levee Comm'rs v. Johnson, 178 KY. 287, 199 S.W. 8 (1917) 17

Hathorn v. Lovorn, 457 U.S. 255 (1982) 14

Schroeder v. New York City, 371 U.S. 208, 9 L.Ed. 255, 83 S. Ct. 279, 89 A.L.R.2d 1398 (1962) 13

No. _____

IN THE

Supreme Court of the United States

October Term, 1989

CHARLES A. FAHRIG and SHIRLEY A. FAHRIG,
Petitioners,

vs.

THE HONORABLE RICHARD S. DODGE, JUDGE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OHIO

PETITION FOR WRIT OF CERTIORARI

Petitioners Charles A. Fahrig and Shirley A. Fahrig are filing the within petition for writ of certiorari and are hereby respectfully requesting that a writ of certiorari issue to the Supreme Court of Ohio.

JUDGMENTS BELOW

The judgments appealed from, dated November 15, 1989, December 20, 1989, and December 20, 1989 are set forth in the appendix on pages A1, A6 and A7 respectively. The Decision and Entry of the Court of Appeals for the Second Appellate District is set forth in the appendix on pages A2, A3, A4 and A5.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is invoked on the grounds that the Supreme Court of Ohio is upholding the particular state action by the court of appeals of summarily dismissing petitioners' original action (a complaint for writ of mandamus) upon the filing of a motion to dismiss by the respondent on the ground that even though the summary dismissal of the case which was made by the court of appeals,

a. without first affording these petitioners an opportunity to respond to or to be heard on the motion to dismiss, and also,

b. without having the quorum of three judges as constitutionally and statutorily required to hear the case,

offends neither federal nor state action.

Petitioners believe that this Honorable Court has the power to review the state supreme court judgment—though on the federal question only, if this Court determines after a search of the record that the Supreme Court of Ohio has upheld the particular state action by the court of appeals on the ground that it offends neither federal nor state law.

Petitioners can demonstrate that the state ground is not independent and adequate and can not account for the decision below—the summary dismissal of petitioners' complaint for writ of mandamus.

Petitioners believe that a search of the record will indicate that the asserted state ground for the summary dismissal without hearing of petitioners' complaint for writ of mandamus is not independent or adequate and

that therefore it will be presumed that the Supreme Court of Ohio based its judgment on the law raising the federal question, and therefore this Court can take jurisdiction and hear this cause.

The date of entry of judgment sought to be reviewed is November 15, 1989 (App. A1).

The date of order of rehearing is December 20, 1989 (App. A6).

The date of order for extension to file petition for writ of certiorari is March 26, 1990, extending time to and including May 19, 1990, and further extended to and including Monday, May 21, 1990 by Rule 30 of the Rules of the Supreme Court.

The statutory provision conferring jurisdiction to review judgment by writ of certiorari is U.S.C. Title 28, Section 1257.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND TREATISES INVOLVED IN CASE

Constitutions:

Ohio Const. IV, §3 (App. A8).

Ohio Const. I, §16 (App. A9).

Constitution of the United States, Amendment XIV, §1 (App. A10).

Statutes:

O.R.C. 2501.013 (App. A11).

O.R.C. 2501.02 (App. A13).

Supreme Court of Ohio Rules:

Rule 7, §2 (App. A14).

Appellate Rules:

Rule 8—Second District, Local Rule (App. A16).

Rule 9—Ohio Appellate Rule (App. A17-A22).

Rule 10—Ohio Appellate Rule (App. A22-A24).

Ohio Rules of Civil Procedure:

Rule 7 (App. A25).

Rule 12 (App. A25).

Rule 56 (App. A26).

Rules of the Common Pleas Court of Montgomery County:

Rule 2.09 (App. A27).

Treatises:

4 O. Jur. 3d §473, pp. 852, 853 (App. A14).

Ohio Civil Practice, by Klein, Browne, & Murtaugh Vol. 1 at page 163 of T21.19 (Pet. 12-13).

STATEMENT OF THE CASE

The underlying case was filed on October 15, 1975 as Case Number 75-2385. It was dismissed twice by the Common Pleas Court, and appealed and reversed twice by the Court of Appeals of the Second Appellate District Montgomery County, Ohio. On February 5, 1988 it was dismissed for the third time and was appealed to the Court of Appeals for the third time.

Pursuant to App. R. 9 petitioners submitted nine (9) motions to the trial court to correct and supplement the record for appeal. These motions contained narrative statements of proceedings of hearings where no court reporter was present or statements of corrections for the transcript of proceedings prepared by the court reporter (App. R. 9 SEE App. A17-A22).

The trial judge (the respondent in this petition) refused to 'settle' and 'approve' even one of the nine motions. He overruled the motions claiming that they were not necessary.

Since the respondent refused to settle the record which was his legal duty to do, and since the respondent was the only one who could settle the record as to the narrative statements submitted, these petitioners filed a complaint for writ of mandamus in the court of appeals asking that court to order the respondent to 'settle' and 'approve' the record.

On **November 22, 1988 at 10:42 A.M.** the respondent, by counsel, filed a motion to dismiss (with an attached exhibit) petitioners' complaint (App. A28).

The very next day, **November 23, 1988 at 3:53 P.M.** the court of appeals, without affording these petitioners an opportunity to respond or to be heard, dismissed petitioners' complaint by rendering a three (3) page Decision and Entry (App. A2).

Petitioners appealed the dismissal to the Supreme Court of Ohio. Petitioners filed four copies of a 217 page record (App. A30) on July 10, 1989 and eighteen (18) copies of a 60 page brief (App. A32-A45) on October 18, 1989. The Supreme Court dismissed petitioners' appeal on November 15, 1989 (App. A1) and denied a rehearing on December 20, 1989 (App. A6).

The Supreme Court of Ohio denied the briefs instanter on November 15, 1989 (App. A1) and again on December 20, 1989 (App. A7) even though the brief had been filed and date-stamped on October 18, 1989 by the clerk of the Supreme Court.

A written request for an oral argument of the record which had been filed July 10, 1989 was filed pursuant to Supreme Court Rule VII, Sec. 2 (App. A14) on November 27, 1989. This request was denied on December 20, 1989 (App. A7).

The denial entry by the Supreme Court of Ohio of two motions instanter and of one motion for oral argument permitted by the Ohio Supreme Court rule were made without any mention of an "legitimate state interest" with respect to state rules of procedure. Petitioners believe that these were unfair state procedures violative of the Due Process Clause.

Furthermore, as to briefs on the merits on appeals in the Ohio Supreme Court, the Rules of Practice make no specific provision for dismissal or other sanction for failure to file briefs (App. A14).

The Supreme Court had also been informed that the delay of a few days in the completion and the filing of the sixty (60) page brief was caused by the fact that petitioner, Shirley A. Fahrig, was called to serve as a juror for a period of three (3) weeks.

The Federal question was raised by petitioners in these three documents which were filed in this case by these petitioners:

1. In the 'complaint for writ of mandamus' filed in the court of appeals on November 14, 1988

2. In the 'record' filed in the Supreme Court of Ohio on July 10, 1989 which included the 'complaint for writ of mandamus' as noted above and,

3. In the 'brief' which was filed in the Supreme Court of Ohio on October 18, 1989.

The Federal question was passed on as follows:

A. The court of appeals passed on the Federal question by sustaining the respondent's motion to dismiss for no cause of action and was silent as to the Federal question (App. A2-A5).

B. The Supreme Court of Ohio passed on the Federal question by dismissing petitioners' appeal without opinion as to the Federal question which had been raised in the complaint as filed in the record on July 10, 1989, and without opinion as to the Federal question raised in the brief which was filed on October 18, 1989 (App. A1, App. A30, and App. A32-A45).

As to No. 1 above, the 'complaint' raised the Federal question in the court of appeals on page 2, para. 5, where petitioners stated as follows:

> "... and further, that any denial of affording Relators a complete and full RECORD for the prosecution of Relators' appeal is a denial to Relators of the due course of law as guaranteed to them by Article I, Section 16, of the Constitution of the State of Ohio, and is also a denial to Relators of

> the due course of law and of the equal protection of the laws as guaranteed to Relators by the Fourteenth Amendment to the Constitution of the United States of America."

and again at page 12, para. 31 where petitioners stated as follows:

> "Relators say that the dereliction on the part of the Defendant, Judge Dodge, of his duty as required by law, denies to these Relators the due course of law as guaranteed by Article I, Section 16, of the Constitution of the State of Ohio; and further, denies to these Relators the due process of law and the equal protection of the law as guaranteed to these Relators by the Fourteenth Amendment to the Constitution of the United States of America."

As to No. 2 above, the 'record' raised the Federal question again on page 2, para. 5 and on page 12, para. 31 of the 'complaint' set out above and which was included in the 'record' as filed in the Supreme Court of Ohio on July 10, 1989.

As to No. 3 above, the 'brief' raised the Federal question in the Supreme Court of Ohio on October 18, 1989 in Propositions of Law No. 1, No. 2, and No. 5 as set out on pages i and ii, 5, 8, 9, and 13 of the brief and as also fully set out below (SEE App. A34-A35, A36-A37, ALSO SEE App. A40-A41):

"Proposition of Law No. 1

> A judicial district having five elected appellate judges, when convening to hear a cause and render a decision thereon, must convene the court with a minimum of three judges, as required by Art. IV, Sec. 3, of the Constitution of Ohio and by O.R.C. 2501.013(B) and 2501.12, and a judgment,

rendered by that court sitting with only two appellate judges, is error and is void and of no force or effect, and the action of the court and the judgment rendered is a denial of the due course of law, the due process of law and the equal protection of the laws as guaranteed by the Constitutions of Ohio and the United States of America."

"Proposition of Law No. 2

The Court of Appeals cannot sustain a Motion To Dismiss Relators' Complaint For Writ of Mandamus for failure to state a claim upon which relief can be granted pursuant to Civ. R. 12(B)(6) when the Motion To Dismiss is supported by documentary evidence and matters outside the pleading; nor, could the Motion To Dismiss be treated as a Motion For Summary Judgment when the supporting documentary evidence and matters outside the pleading are not of the type as enumerated in Civ. R. 56(C), and therefore the dismissal of the complaint, as rendered, is a gross abuse of discretion, is in error, and further, denies the Relators the due course of law, the due process of law and the equal protection of the laws as guaranteed by the Constitutions of Ohio and the United States of America."

"Proposition of Law No. 5

A dismissal by the Court of Appeals of a Complaint For Writ of Mandamus for no cause of action citing Civ. R. 12(B)(6), when the Relators have a clear legal right to the relief prayed for, and the Respondent is under the clear legal duty to perform the requested act, and the Relators have no plain and adequate remedy at law, is error and an abuse of discretion and a denial of the due course of law, the due process of law, and the equal protection of the laws as guaranteed by the Constitutions of Ohio and the United States of America."

ARGUMENT

The reasons why this writ should be granted are:

Reason No. I. Petitioners were deprived of due process of law by the court of appeals denying them the opportunity to be heard before suffering the summary dismissal of their complaint for writ of mandamus after the respondent had filed his motion to dismiss.

Rule 8(A) (App. A16) of the appellate rules states that the Civil Rules of Procedure will apply to original actions filed in the court of appeals.

Ohio Civ. R. 7(B)(2) (App. A25) states as follows:

> "(B)(2) Motions
>
> To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition."

Rule 2.09 (App. A27) of the local Montgomery County Common Pleas Court Rules provides that a party opposing a motion "shall serve and file a brief written memorandum within fourteen (14) days setting forth his reason in opposition to the motion." No provision is made for an oral hearing by Rule 2.09.

In Vol. I of Ohio Civil Practice by Klein, Browne, and Murtaugh, in Chapter T21.19, at page 163, it states:

> "**21.19 Introduction to hearing on the motion**
>
> *(A) Due process need for a hearing*
>
> Notice and an opportunity to be heard are the foundations on which the concept of procedural due process is built. Therefore, no citation of authority is need to say that the parties to a motion proceeding have the right to be heard with respect to the motion before the court grants or denies it. Indeed, the Civil Rules

> themselves are replete with reference to the 'hearing' on the motion. Thus, it is error for the court to make a substantive disposition in an action completely on its own 'motion' and it is equally error for the court to fail to make any disposition on a motion properly made by a party. In either case, the error lies in denying the parties their fundamental right to a hearing." (Citations omitted).

In *Schroeder v. New York City* (1962), 371 U.S. 208, 9 L.Ed. 2d 255, 259, 83 S. Ct. 279, 89 A.L.R.2d 1398, the United States Supreme Court has referred to "the right to be heard" as "one of the most fundamental requisites of due process."

In *Armstrong v. Manzo* (1965), 380 U.S. 545, 14 L.Ed. 2d 62, 66, 85 S. Ct. 1187, the United States Supreme Court stated:

> "A fundamental requirement of due process is the opportunity to be heard."

Reason No. II. Petitioners were deprived of due process of law and were denied the equal protection of the laws when the court of appeals rendered a dismissal of petitioners' complaint for writ of mandamus by only two appellate judges when the statutory and constitutional requirement is that a quorum of three (3) judges shall participate in the "hearing and disposition of a case".

Once the general assembly vested jurisdiction in the Courts of Appeals, access to that court became a constitutional, as well as a statutory right under the constitutional sections quoted below. Since only two judges participated in the "hearing and disposition" of this case the judgments were rendered contrary to the requirements as set forth in Ohio Const. IV, §3 (App. A8), O.R.C. 2501.013 (App. A11), and O.R.C. 2501.02 (App. A13).

The Court of Appeals of the Second Appellate District is comprised of five (5) judges and therefore, according to the requirements of Ohio Const. IV, §3 (App. A8) three (3) judges must participate in the "hearing and disposition" of a case. Only two (2) judges names are on the Decision and Entry rendered November 23, 1988 (App. A2).

Reason No. III. Petitioners were deprived of due process of law and were denied the equal protection of the laws by the Supreme Court of Ohio when it denied petitioners

A. their right to a hearing on the merits of their record, duly filed on July 10, 1989 in their direct appeal,

B. their right to a hearing on the merits of their brief, duly filed on October 18, 1989 in their direct appeal,

C. their right to an oral hearing on the merits of their direct appeal, and,

D. their right to a trial *de novo*, since there was no legitimate state interest with respect to the state rules of procedure and that therefore this Court should find fundamentally unfair these state procedures violative of the Due Process Clause.

In *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) this Court said:

> "We have often pointed out that state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review."

In *Hathorn v. Lovorn*, 457 U.S. 255, 264-65 (1982) this Court concluded that the state court's unexplained denial of rehearing in this case "must have rested either

upon a substantive rejection of petitioner's federal claim or upon a procedural rule that the state court applies only irregularly."

The Supreme Court of Ohio does not apply its procedural requirements strictly or regularly. Many litigants are permitted to file briefs 'instanter' when the delay is unintentional and explainable. In petitioners' case the few days delay was caused by a three-week summons for jury duty which prevented petitioners from performing legal research. Petitioners must drive to Cincinnati and Columbus, Ohio, or to the Commonwealth of Kentucky in order to use the law library since petitioners are not permitted to use the local Dayton and Montgomery County Law Library. The Supreme Court was apprised of that fact. Furthermore, the Supreme Court knew that petitioners had filed eighteen (18) copies of a proper sixty (60) page brief in the case on October 18, 1989. (See App. A32-A45 for contents and substance of brief filed.)

In addition, there is no provision in the Supreme Court of Ohio rules for dismissal of a case even if a brief is not filed. See 4 O. Jur. 3d §473, pp. 852, 853, set out in full at App. A14.

Petitioners were also denied their request for an oral hearing on the 'record' which contained a copy of the complaint for writ of mandamus and the federal claims contained therein. Petitioners were also denied a rehearing.

Petitioners were entitled to a trial *de novo* since they had received no hearing in the court of first instance.

The Supreme Court of Ohio has denied every request made by these petitioners and every right due them. The court has arbitrarily denied,

—a request to file briefs instanter which had already been filed by the clerk of court,

—a request for an oral hearing on the record already filed by the clerk of court (See Rule VII (2) (App. A14),

—a request for a rehearing, and,

—a right to a trial *de novo.*

These denials for every request and every right discriminate against these petitioners because many litigants are not denied similar requests and similar rights.

Petitioners ask this Court to find that there was no legitimate state interest to the state rules of procedure and that therefore this Court will find fundamentally unfair these state procedures violative of the Due Process Clause.

State procedural requirements which are not strictly or regularly followed should not deprive this Honorable Court of their right to review petitioners' cause.

CONCLUSION

In *Board of Levee Comm'rs v. Johnson*, 178 Ky 287, at 298, 199 S.W. 8, at 12 (1917), the Kentucky Court had this to say about the guarantee of 'due process of law':

> "(they) have come to be regarded as so fundamental a part of every enlightened system of government that no free people would dare to leave them out of their organic law and *no court would now be so bold as to attempt to set them aside or deprive them of the meaning they have been universally adjudged to have since their insertion in the constitutions of the state and the nation*, and indeed, long before written constitutions were thought of." (Emphasis added).

The Court of Appeals *boldly* deprived these petitioners of their state and federal constitutional rights to 'due process of law'. This blatant and *bold* deprivation of 'due process of law' was made openly and on the record.

The motion to dismiss petitioners' complaint for writ of mandamus was filed by the respondent on **November 22, 1988 at 10:42 A.M.** Even before these petitioners could have received a copy of the motion to dismiss by mail, the Court of Appeals rendered on the next day, **November 23, 1988 at 3:53 P.M.**, a four (4) page summary dismissal of petitioners' complaint for writ of mandamus which *boldly* deprived these petitioners of 'due process of law'. (App. A2-A5).

The Supreme Court of Ohio upheld the court of appeals by further *boldly* depriving petitioners of 'due process of law'. (App. A1, A6).

Petitioners respectfully ask this Court for the reasons as mentioned in the foregoing petition to issue a petition for writ of certiorari to the Supreme Court of Ohio.

Petitioners wish to inform the Court that they diligently tried to obtain the services of an attorney to represent them for this petition for writ of certiorari but were unsuccessful.

Respectfully submitted,

CHARLES A. FAHRIG
SHIRLEY A. FAHRIG
27 Loganwood Drive
P. O. Box 522
Centerville, Ohio 45459
Telephone: (513) 433-0546
Petitioners, Appearing Pro Se

APPENDIX

ENTRY OF THE SUPREME COURT OF OHIO

(Filed November 15, 1989)

Case No. 89-123

THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.
CHARLES A. FAHRIG, *et al.*,
Appellants,

v.

HONORABLE RICHARD S. DODGE,
Appellee.

ENTRY

This cause is pending before the Court as an appeal from the Court of Appeals for Montgomery County. Upon consideration of appellants' motion for reconsideration of this Court's denial of their request for an extension of time to file their brief, and motion to file their brief instanter,

IT IS ORDERED by the Court that said motions be, and the same are hereby, denied.

ACCORDINGLY, IT IS FURTHER ORDERED by the Court that this cause be, and the same is hereby, dismissed.

/s/ THOMAS J. MOYER
Chief Justice

DECISION AND ENTRY OF THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

(Filed November 23, 1988; 3:53 p.m.)

Case No. 11291

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO, ex rel.
CHARLES A. FAHRIG, *et al.*,
Relator,

vs.

HON. RICHARD S. DODGE,
Respondent.

DECISION AND ENTRY

(Rendered on the 23rd day of November, 1988

CHARLES A. FAHRIG, SHIRLEY A. FAHRIG, 27 Loganwood Drive, Centerville, Ohio 45458

Relators, Pro Se

MAUREEN C. NEWKOLD, Assistant Prosecuting Attorney, 41 North Perry Street, Suite 300, Dayton, Ohio 45402.

Attorney for Respondent

PER CURIAM:

This case is before us on the motion of the respondent to dismiss the relators' petition for writ of mandamus. The petition was filed in this court on November 14, 1988 and assigned Case No. 11291.

The specific relief requested by the relators is as follows:

> 1. That a WRIT OF MANDAMUS issue against the Defendant, Honorable Richard S. Dodge, who is under a clear legal duty to perform, DIRECTING and ORDERING the Defendant, Honorable Richard S. Dodge, pursuant to the within COMPLAINT FOR WRIT OF MANDAMUS and EXHIBITS thereto, and pursuant to Appellate Rule 9(C), to "settle and approve", the STATEMENT OF PROCEEDINGS as described and set out in full in EXHIBITS I through EXHIBITS IX and in [2] Paragraphs No. 11 through 19 herein, prior to the time for the transmission of the Record, pursuant to Appellate Rule 10 and Rule 10(B)(2) and, as "settled and approved", have the STATEMENTS OF PROCEEDINGS included by the Clerk of the Trial Court in the RECORD for Relators' Appeal;
>
> and further, pursuant to Appellate Rule 9(E), to "settle" the differences in and omissions from the Record submitted to the Defendant, Honorable

> Richard S. Dodge, by Relators' STATEMENTS OF PROCEEDINGS and STATEMENTS OF PROPOSED CORRECTIONS as described and set out in full in EXHIBITS I through EXHIBITS IX and in Paragraphs 11 through 19 herein; and, to thereafter have the Defendant, Honorable Richard S. Dodge, "settle" those differences and to have the omissions "corrected" as submitted by the Relators; and, to thereafter have the Record "conform to the truth."

The relators have attached several exhibits to their petition, including exhibit E, a copy of a time-stamped Entry signed by Judge Richard S. Dodge. The entry contains the court's ruling on nine separate motions to correct and supplement the record, which were filed by the relators in the trial court and which are the subject of this petition for writ of mandamus.

In order to grant a writ of mandamus, the relator must have a clear legal right to the relief prayed for, the respondent must be under a clear legal duty to perform the requested act, and the relator must have no plain and adequate remedy at law. *State ex rel. Westchester Estates, Inc. v. Bacon* (1980), 61 Ohio St. 2d 42. A motion to dismiss is well taken if it affirmatively appears from the allegations of the complaint that no set of facts could be established by evidence which would entitle the complainant to the relief he requests. Civ. R. 12(B)(6); *O'Brien v. University Tenants Union* (1975), 42 Ohio St. 2d 242.

[3] The relators want this court to issue a writ of mandamus to order Judge Dodge to settle and approve their various motions to correct and supplement the record. The court did do that very act when it issued the August 30, 1988 entry. The petitioners have attached that entry as Exhibit E and incorporated it into their

complaint. The petitioners may not agree with the entry or the trial court's rulings on their motions. However, the face of the petition for writ of mandamus which includes Exhibit E, clearly indicates that the respondent has performed the act which relators request this court to order respondent to do.

A writ of mandamus will not lie to control judicial discretion, R.C. 2731.03, nor will it be issued where the relators have a plain and adequate remedy in the ordinary course of the law. R.C. 2731.05. Here, the relators ask relief in the form of an order to control the discretion of the trial court, which may not be done as stated in R.C. 2731.03. Likewise, the relators may appeal from the rulings of the trial court if the relators do not agree with those decisions.

The motion to dismiss is well taken. Case No. 11291 is dismissed for failure to state a claim for which the relief of a writ of mandamus can issue.

/s/ JAMES A. BROGAN
Judge

/s/ WILLIAM H. WOLFF, JR.
Judge

Copies mailed to:

[4] Charles A. Fahrig
Shirley A. Fahrig
Maureen C. Newkold

ENTRY OF THE SUPREME COURT OF OHIO DENYING REHEARING

(Filed December 20, 1989)

Case No. 89-123

THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.
CHARLES A. FAHRIG, *et al.*,
Appellants,

v.

RICHARD S. DODGE, JUDGE,
Appellee.

REHEARING ENTRY

(Montgomery County)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. CA11291).

/s/ THOMAS J. MOYER
Chief Justice

ENTRY OF THE OHIO SUPREME COURT

(Filed December 20, 1989)

Case No. 89-123

THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.
CHARLES A. FAHRIG, *et al.*,
Appellants,

v.

RICHARD S. DODGE, JUDGE,
Appellee.

ENTRY

This cause came on for further consideration upon appellants' second motion for leave to file their brief instanter and appellants' request for oral argument. Upon consideration thereof,

IT IS ORDERED by the Court that said motion and request be, and the same are hereby, denied.

/s/ THOMAS J. MOYER
Chief Justice

CONSTITUTIONS

Ohio Constitution
Article IV, Section 3 Courts of appeals

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B)(1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2 (B)(2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of rules in the courts of appeals.

HISTORY: 132 v HJR 42, adopted eff. 5-7-68.

Ohio Constitution

Article I, Section 16 provides, in pertinent part, as follows:

SECTION 16. REDRESS IN COURTS

All Courts shall be open and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law and shall have justice administered without denial or delay . . .

Constitution of the United States

AMENDMENT XIV

Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

Ohio Revised Code

2501.013 Additional judges for first, second, third, and fourth districts

(A) There shall be three additional judges of the court of appeals of the first district, composed of Hamilton county.

The additional three judges shall be elected at the general election in 1976 for terms of six years, their terms to commence on successive days beginning on the tenth day of February, 1977. The additional judges shall thereafter be elected to hold terms of six years.

In the first district, any three judges shall comprise the court of appeals in the hearing and disposition of cases in accordance with any local rules of practice and procedure that may be adopted by the judges of the court.

(B) There shall be two additional judges of the court of appeals of the second district, composed of Champaign, Clark, Darke, Greene, Miami, and Montgomery counties.

One of the additional judges of the second district court of appeals shall be elected at the general election in 1980 for a term of six years beginning February 10, 1981. One of the additional judges of the second district court of appeals shall be elected at the general election in 1986 for a term of six years beginning February 11, 1987. The additional judges shall thereafter be elected to hold terms of six years.

In the second district, any three judges shall comprise the court of appeals in the hearing and

disposition of cases in accordance with any local rules of practice and procedure that may be adopted by the judges of the court.

(C) There shall be one additional judge of the court of appeals of the third district, composed of Mercer, Van Wert, Paulding, Defiance, Henry, Putnam, Allen, Auglaize, Hancock, Hardin, Logan, Union, Seneca, Shelby, Marion, Wyandot, and Crawford counties.

The additional judge shall be elected at the general election in 1986 for a term of six years beginning February 11, 1987. The additional judge shall thereafter be elected to hold terms of six years.

In the third district, any three judges shall comprise the court of appeals in the hearing and disposition of cases in accordance with any local rules of practice and procedure that may be adopted by the judges of the court.

(D) There shall be one additional judge of the court of appeals of the fourth district, composed of Adams, Highland, Pickaway, Ross, Pike, Scioto, Lawrence, Gallis, Jackson, Meigs, Vinton, Hocking, Athens, and Washington counties.

The additional judge shall be elected at the general election in 1988 for a term of six years beginning February 10, 1989. The additional judge shall thereafter be elected to hold terms of six years.

In the fourth district, any three judges shall comprise the court of appeals in the hearing and disposition of cases in accordance with any local rules of practice and procedure that may be adopted by the judges of the court.

HISTORY: 1987 S 171, eff. 10-20-87
1986 H 815; 1984 H 113; 1980 S 13; 1976 H 468

2501.02 Qualifications and terms of judges; jurisdiction; issuance of writs

Each judge of a court of appeals shall have been admitted to practice as an attorney at law in this state and have, for a total of six years preceding his appointment or commencement of his term, engaged in the practice of law in this state or served as a judge of a court of record in any jurisdiction in the United States, or both. One judge shall be chosen in each court of appeals district every two years, and shall hold office for six years, beginning on the ninth day of February next after his election. In addition to the original jurisdiction conferred by Section 3 of Article IV, Ohio Constitution, the court shall have jurisdiction upon an appeal upon questions of law to review, affirm, modify, set aside, or reverse judgments of final orders of courts of record inferior to the court of appeals within the district, including the finding, order, or judgment of a juvenile court that a child is delinquent, neglected, abused, or dependent, for prejudicial error committed by such lower court.

The court, on good cause shown, may issue writs of supersedeas in any case, and all other writs, not specially provided for or prohibited by statute, necessary to enforce the administration of justice.

HISTORY: 1986 H 412, eff. 3-17-87
1975 H 85; 1971 H 18, H 1; 129 v 582; 126 v 56; 1953 H 1; GC 1514

SUPREME COURT RULES

RULE VII. ASSIGNMENT OF CASES ON APPEAL FOR ORAL ARGUMENT

Section 2. Argument on Merit Cases

In any action instituted originally in a court of appeals, oral argument may be had on approval of a request therefor, provided that the court may, if it so desires, require such oral argument in any case. Any request for oral argument must be made in writing, by either party, within seven days after the filing of the brief of the appellee.

Any merit case may be submitted on behalf of either or both parties without oral argument, whatever may be its place on the docket. Any party who wishes to waive oral argument must notify the Court ten days before the date of hearing. Failure of an appellant to appear, without so notifying the Court, may be treated as an abandonment of the appeal and result in dismissal for lack of prosecution.

APPELLATE REVIEW 4 O JUR 3d §473 pp 852, 853

§473. Failure to file briefs, or delay in filing; in Supreme Court

. . . As to briefs on the merits on appeals in the Ohio Supreme Court, the Rules of Practice provide in full for the form and contents of such briefs, but make no specific provision for dismissal or other sanction for

failure to file such briefs.[44] At an earlier time, the Supreme Court Rules did provide that for want of copies of briefs as specified in the rules, unless good reason was shown, the cause would be dismissed for want of prosecution, or otherwise disposed of at the discretion of the court.

[44] Rules of Practice of the Supreme Court, Rule V, Note that Rules of Practice of the Supreme Court, Rule VII, §2, does make provision for dismissal of an appeal in the Supreme Court for lack of prosecution for failure of an appellant to appear for oral argument in absence of notification that such argument is waived.

OHIO APPELLATE RULES

RULE 8. PROCEDURES GOVERNING ORIGINAL ACTIONS

(A) The Civil Rules of Procedure and, if appropriate, the applicable statutes will apply to original actions.

(B) Pleadings in original actions shall contain the specific facts essential to apprise the Court and notify opposing counsel of the evidential basis for the claim and the relief requested. In addition to the service required by law, such pleadings must be filed and served upon opposing counsel, if known, or upon the opposing party, if counsel is unknown, before any conference or order is requested.

(C) In original actions involving an urgent or emergency situation reasonable notice under the circumstances shall be given to the opposing party or to counsel of any motion or request prior to presenting the request to the Court. In such situations the time for further action may be determined by the presiding judge.

(D) After an original action is at issue and all of counsel have been notified, the Court may and upon request will schedule a prehearing conference at the Chambers of one member of the Court to expedite the submission of the evidence and take such other actions as may be necessary. Appellate Rule 20.

(E) Original actions may be submitted on the pleadings, by an agreed statement of facts, by deposition or any combination of these methods. Such submission of the facts shall be made 30 days after the last authorized pleadings. In the event the facts are not submitted when required, the Court may appoint a Referee pursuant to Civil Rule 53. The rules of evidence

shall apply to the taking of testimony. Unless all evidence is presented and the plaintiff's brief is filed within six months after filing an original action, the case may be dismissed for want of prosecution unless good cause is shown in writing to the contrary within the six month period.

(F) After the evidence has been submitted and filed, the plaintiff or relator shall file his brief within 20 days. The defendant or respondent's brief shall be filed within twenty days thereafter. All reply briefs shall be filed within 10 days thereafter. Original actions will not be assigned for oral argument except by order of the Court.

RULE 9. THE RECORD ON APPEAL

(A) Composition of the Record on Appeal. The original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases. A videotape recording of the proceedings constitutes the transcript of proceedings other than hereinafter provided, and, for purposes of filing, need not be transcribed into written form. Proceedings recorded by means other than videotape must be transcribed into written form. When the written form is certified by the reporter in accordance with App.R. 9(B), such written form shall then constitute the transcript of proceedings. When the transcript of proceedings is in the videotape medium, counsel shall type or print those portions of such transcript necessary for the court to determine the questions presented, certify their accuracy, and append such copy of the portions of the transcripts to their briefs.

In all capital cases the trial proceedings shall include a written transcript of the record made during the trial by stenographic means.

(B) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript Is Ordered. At the time of filing the notice of appeal the appellant shall in writing order from the reporter a complete transcript or a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record and shall file a copy of said order with the clerk. The reporter is the person appointed by the court to transcribe the proceedings for the trial court whether by stenographic, phonogramic or photographic means, or by the use of audio electronic recording devices, or by the use of video recording system. If there be no officially appointed reporter, Rule 9(C) or 9(D) may be utilized. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the weight of the evidence, he shall include in the record a transcript of all evidence relevant to such findings or conclusion. Unless the entire transcript is to be included, or if no transcript is necessary, or if a statement pursuant to either Rule 9(C) or 9(D) is to be prepared in lieu of a transcript, the appellant shall, with his notice of appeal, file with the clerk of the trial court and serve on the appellee a description of the parts of the transcript which he intends to include in the record or a statement that no transcript is necessary or that a statement pursuant to either Rule 9(C) or 9(D) will be submitted, and a statement of the assignments of error he intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within ten days after the service of the statement of the appellant, file and serve on the appellant a

designation of additional parts to be included. The clerk of the trial court shall forward a copy of this designation to the clerk of the court of appeals.

If the appellant shall refuse or fail within ten days after service upon him of appellee's designation, to order such parts, the appellee within five days thereafter, shall either order the part in writing from the reporter or apply to the court of appeals for an order requiring the appellant to do so. At the time of ordering, a party shall arrange for the payment to the reporter of the cost of the transcript.

A transcript prepared by a reporter under this rule shall be in the following form:

(1) The transcript shall include a front and back cover; the front cover shall bear the title and number of the case and the name of the court wherein the proceedings occurred;

(2) The transcript shall be firmly bound on the left side;

(3) The first page inside the front cover shall set forth the nature of the proceedings, the date or dates of the proceedings and the judge or judges who presided;

(4) The transcript shall be prepared upon white paper 8½ x 11 inches in size with the lines of each page numbered and the pages sequentially numbered;

(5) An index of witnesses shall be included in the front of the transcript and shall contain page and line references to direct, cross-, re-direct, and re-cross examination;

(6) An index to exhibits, whether admitted or rejected, briefly identifying each exhibit, shall be included following the index to witnesses reflecting the

page and line references where the exhibit was identified and offered into evidence, was admitted or rejected and if any objection was interposed;

(7) Exhibits such as papers, maps, photographs and similar items which were admitted shall be firmly attached, either directly or in an envelope to the inside rear cover except as to exhibits whose size or bulk makes attachment impractical; documentary exhibits offered at trial whose admission was denied shall be included in a separate envelope with a notation that they were not admitted and also attached to the inside rear cover unless attachment is impractical;

(8) No volume of a transcript shall exceed two hundred and fifty (250) pages in length, except it may be enlarged to three hundred (300) pages, if necessary, to complete a part of the voir dire, opening statements, closing arguments or jury instructions; when it is necessary to prepare more than one volume, each volume shall contain the number and name of the case and be sequentially numbered, and the separate volumes shall be approximately equal in length.

The reporter shall certify the transcript as correct whether in written or videotape form and state whether it is a complete or partial transcript, and, if partial, indicate the parts included and the parts excluded.

If the proceedings were recorded in part by videotape and in part by other media, the appellant shall order the respective parts from the proper reporter. The record is complete for the purposes of appeal when the last such part is filed with the clerk of the trial court.

(C) Statement of the Evidence or Proceedings When No Report Was Made or When the Transcript is Unavailable. If no report of the evidence or proceedings

at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee no later than twenty days prior to the time for transmission of the record pursuant to Rule 10, who may serve objections or propose amendments thereto within ten days after service. Thereupon, the statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act thereon prior to the time for transmission of the record pursuant to Rule 10, and, as settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal.

(D) **Agreed Statement as the Record on Appeal.** In lieu of the record on appeal as defined in subdivision (A) of this rule, the parties may, no later than ten days prior to the time for transmission of the record pursuant to Rule 10, prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the trial court may consider necessary fully to present the issues raised by the appeal, shall be approved by the trial court prior to the time for transmission of the record pursuant to Rule 10, shall then be certified to the court of appeals as the record on appeal and transmitted thereto by the clerk of the trial court within the time provided by Rule 10.

(E) Correction or Modification of the Record. If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted in the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

[Amended effective July 1, 1977; July 1, 1978; July 1, 1988.]

RULE 10. TRANSMISSION OF THE RECORD

(A) Time for Transmission; Duty of Appellant. The record on appeal, including the transcript and exhibits necessary for the determination of the appeal, shall be transmitted to the clerk of the court of appeals when the record is complete for the purposes of appeal, or when forty days, which is reduced to twenty days for an accelerated calendar case, have elapsed after the filing of the notice of appeal and no order extending time has been granted under subdivision (C). After filing the notice of appeal the appellant shall comply with the provisions of Rule 9(B) and shall take any other action necessary to enable the clerk to assemble and transmit the record. If more than one appeal is taken, each appellant shall comply with the provisions of Rule 9(B)

and this subdivision, and a single record shall be transmitted when forty days have elapsed after the filing of the final notice of appeal.

(B) Duty of Clerk to Transmit the Record. The clerk of the trial court shall prepare the certified copy of the docket and journal entries, assemble the original papers, (or in the instance of an agreed statement of the case pursuant to Rule 9(D), the agreed statement of the case), and transmit the record upon appeal to the clerk of the court of appeals within the time stated in Subdivision (A). The clerk of the trial court shall number the documents comprising the record and shall transmit with the record a list of the documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight and physical exhibits other than documents shall not be transmitted by the clerk unless he is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

Transmission of the record is effected when the clerk of the trial court mails or otherwise forwards the record to the clerk of the court of appeals. The clerk of the trial court shall indicate, by endorsement on the face of the record or otherwise, the date upon which it is transmitted to the court of appeals and shall note the transmission on the appearance docket.

The record shall be deemed to be complete for the purposes of appeal under the following circumstances;

(1) When the transcript of proceedings is filed with the clerk of the trial court.

(2) When a statement of the evidence or proceedings, pursuant to Rule 9(C), is settled and approved by the trial court, and filed with the clerk of the trial court.

(3) When an agreed statement in lieu of the record, pursuant to Rule 9(D), is approved by the trial court, and filed with the clerk of the trial court.

(4) Where appellant, pursuant to Rule 9(B), designates that no part of the transcript of proceedings is to be included in the record or that no transcript is necessary for appeal, after the expiration of ten days following service of such designation upon appellee, unless appellee has within such time filed a designation of additional parts of the transcript to be included in the record.

(5) When forty days have elapsed after filing of the last notice of appeal, and there is no extension of time for transmission of the record.

(6) When twenty days have elapsed after filing of the last notice of appeal in an accelerated calendar case, and there is no extension of time for transmission of the record.

(7) Where the appellant fails to file either the docketing statement or the statement required by App.R. 9(B), ten days after filing the notice of appeal.

OHIO RULES OF CIVIL PROCEDURE

RULE 7. PLEADINGS AND MOTIONS

(b) Motions.

(2) To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

RULE 12. DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON THE PLEADINGS

(B) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 or Rule 19.1. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the

pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

RULE 56. SUMMARY JUDGMENT

(C) **Motion and Proceedings Thereon.** The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

RULES OF THE COMMON PLEAS COURT OF MONTGOMERY COUNTY

RULE 2.09 MOTIONS

(a) The moving party shall serve and file with his motion a brief written memorandum setting forth the reasons in support of the motion and containing the citations of any authorities on which he relies. If the motion requires the consideration of facts not appearing of record, he shall also serve and file copies of all photographs or documentary evidence he intends to present in support of the motion in addition to the affidavits required by the Ohio Rules of Civil Procedure.

(b) Each party opposing the motion shall serve and file, within fourteen (14) days from the time when a copy of the motion has been served upon him, a brief written memorandum setting forth the reasons in opposition to the motion and containing the citations of the authorities on which he relies. If the motion requires the consideration of facts not appearing of record, he shall also serve and file copies of all photographs or documentary evidence which he intends to submit in opposition to the motion, in addition to the affidavits required by the Ohio Rules of Civil Procedure. If no memorandum is filed within the time limits provided herein, the motion may be decided forthwith.

(c) The clerk shall deliver all motions requiring the attention of the court on the first Monday following their filing to the respective judges to whom they are assigned. All memoranda in opposition to said motions shall be delivered to the assigned judge on the day after filing. Motions filed in the Domestic Relations Court and Juvenile Court are delivered to the appropriate judge as soon as possible.

MOTION TO DISMISS RELATORS' COMPLAINT FOR WRIT OF MANDAMUS

(Filed in the Court of Appeals,
Montgomery County, Ohio
November 22, 1988; 10:42 a.m.)

Case No. CA-11291

IN THE COURT OF APPEALS FOR
MONTGOMERY COUNTY, OHIO
SECOND APPELLATE DISTRICT

STATE OF OHIO, EX REL.
CHARLES A. FAHRIG, *et al.*,
Relators,

v.

RICHARD S. DODGE, JUDGE,
Respondent.

MOTION TO DISMISS RELATORS' COMPLAINT FOR WRIT OF MANDAMUS

Now comes the above-referenced Respondent, by and through counsel, and moves this Court to enter a dismissal judgment in his favor on the grounds that the Complaint for Writ of Mandamus fails to state a claim

upon which relief can be granted. A Memorandum in Support of this Motion is attached hereto and made a part hereof.

Respectfully submitted,

LEE C. FALKE, Prosecuting Attorney
of Montgomery County, Ohio

/s/ MAUREEN C. NEWKOLD
Assistant Prosecuting Attorney
41 North Perry Street
Suite 300
Dayton, Ohio 45402
Telephone: (513) 225-5757
Attorney for Respondent

FIRST PAGE OF RECORD FILED IN SUPREME COURT OF OHIO JULY 10, 1989

No. 89-123

IN THE SUPREME COURT OF OHIO

Appeal from the Court of Appeals
Second Appellate District
Montgomery County, Ohio

This case originated in the
Court of Appeals

THE STATE OF OHIO, ex rel.,
CHARLES A. FAHRIG and
SHIRLEY A. FAHRIG,
Relators-Appellants,

v.

THE HONORABLE RICHARD S. DODGE, JUDGE,
Respondent-Appellee.

RECORD

Charles A. Fahrig
Shirley A. Fahrig
27 Loganwood Drive
Centerville, Ohio 45458
Telephone (513) 433-0546
Appearing Pro Se
As Relators-Appellants

Maureen C. Newkold
Assistant Prosecuting Attorney
for Montgomery County, Ohio
Third Floor
Montgomery County Courts Building
41 North Perry Street
Dayton, Ohio 45402
Telephone (513) 225-5757
Attorney for Respondent-Appellee

FILED
JUL 10 1989
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

FIRST ELEVEN PAGES OF BRIEF FILED IN SUPREME COURT OF OHIO OCTOBER 18, 1989

No. 89-123

IN THE SUPREME COURT OF OHIO

Appeal from the Court of Appeals
Second Appellate District
Montgomery County, Ohio

This case originated in the
Court of Appeals

THE STATE OF OHIO, ex rel.,
CHARLES A. FAHRIG and
SHIRLEY A. FAHRIG,
Relators-Appellants,

v.

THE HONORABLE RICHARD S. DODGE, JUDGE,
Respondent-Appellee.

RELATORS-APPELLANTS' BRIEF

Charles A. Fahrig
Shirley A. Fahrig
27 Loganwood Drive
Centerville, Ohio 45458
Telephone (513) 433-0546
Appearing Pro Suis as
Relators-Appellants

Maureen C. Newkold
Assistant Prosecuting Attorney
for Montgomery County, Ohio
Third Floor
Montgomery County Courts Bldg.
41 North Perry Street
Dayton, Ohio 45402
Telephone (513) 225-5757
Attorney for Respondent-Appellee

FILED
OCT 18 1989
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

TABLE OF CONTENTS

TABLE OF AUTHORITIES viii

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 3

ARGUMENT 5

Proposition of Law No. 1 5

A judicial district having five elected appellate judges, when convening to hear a cause and render a decision thereon, must convene the court with a minimum of three judges, as required by Art. IV, Sec. 3, of the Constitution of Ohio and by O.R.C. 2501.013(B) and 2501.02, and a judgment, rendered by that court sitting with only two appellate judges, is error and is void and of no force or effect, and the action of the court and the judgment rendered is a denial of the due course of law, the due process of law and the equal protection of the laws as guaranteed by the Constitutions of Ohio and the United States of America.

Authorities cited in Support of Proposition of Law No. 1:

Ohio Constitution, Art. IV, Sec. 3 5

O.R.C. 2501.013 5

O.R.C. 2501.02 5

Proposition of Law No. 2 8

The Court of Appeals cannot sustain a Motion To Dismiss Relators' Complaint For Writ of Mandamus for failure to state a claim upon which relief can be granted pursuant to Civ. R. 12(B)(6) when the Motion To Dismiss is supported by documentary

evidence and matters outside the pleading; nor, could the Motion To Dismiss be treated as a Motion For Summary Judgment when the supporting documentary evidence and matters outside the pleading are not of the type as enumerated in Civ. R. 56(C), and therefore the dismissal of the complaint, as rendered, is a gross abuse of discretion, is in error, and further, denies the Relators the due course of law, the due process of law and the equal protection of the laws as guaranteed by the Constitutions of Ohio and the United States of America.

Authorities cited in support of Proposition of Law No. 2:

Civ. R. 12(B)(6) 8

Ohio Civil Practice by Klein, Browne and Murtaugh T21.14, page 69 8,9

Proposition of Law No. 3 10

Relators, in filing a Complaint For Writ of Prohibition and/or Complaint For Writ Of Mandamus which are high prerogative writs, are entitled by due course of law and by due process of law to an oral hearing pursuant to Civ. R. 7(B)(2) and Rule 2.09 of the civil rules of practice and procedure for the common pleas court of Montgomery County before suffering a summary dismissal of their complaint by the Court of Appeals by the sustaining of the Respondent's Motion To Dismiss, which motion cited no rule of civil procedure, and which dismissal entry had alleged failure to state a claim upon which relief could be granted and had cited Civ. R. 12(B)(6).

Authorities cited in support of Proposition of Law No. 3

Civ. R. 7(B)(2) 10

Rule 2.09—Local Rule, Montgomery County Com. Pleas Court 10

Ohio Civil Practice by Klein, Browne and Murtaugh Vol. I, Chapter 21.19, page 163 10

Proposition of Law No. 4 12

When a Motion To Dismiss, alleging failure to state a claim upon which relief can be granted, is filed and which is not supported by any rule or statute, the Motion To Dismiss is for all intents and purposes a nullity and the Court of Appeals thereafter, in sustaining the Motion To Dismiss by supplying a rule to support the Motion To Dismiss, is guilty of a gross abuse of discretion and the resulting decision and entry sustaining the Motion To Dismiss is voidable.

Authorities cited in support of Proposition of Law No. 4

Civ. R. 12(B)(6) 12

Proposition of Law No. 5 13

A dismissal by the Court of Appeals of a Complaint For Writ of Mandamus for no cause of action citing Civ. R. 12(B)(6), when the Relators have a clear legal right to the relief prayed for, and the Respondent is under the clear legal duty to perform the requested act, and the Relators have no plain and adequate remedy at law, is error and an abuse of discretion and a denial of the due course of law, the due process of law, and the equal protection of the laws as guaranteed by the Constitutions of Ohio and the United States of America.

Authorities cited in support of Proposition of Law No. 5

State ex rel Westchester v Bacon (1980) 61 Ohio St2d 42, 15 003d 53, 399 N.E.2d 81 13

State ex rel Reisman v Cuyahoga County Board of Elections (1988) 331 N. E.2d 310 13

Proposition of Law No. 6 15

There is no discretion on the part of the trial judge in deciding whether or not to settle and approve a statement of proceedings and/or a statement of corrections submitted to him by appellants for inclusion in the Record on appeal pursuant to App. R. 9(C) and 9(E), and if he refuses to do so remedy by appeal is inadequate, and mandamus is the proper remedy.

Authorities cited in support of Proposition of Law No. 6

Rule 9, Ohio Rules of Appellate Procedure 15

Proposition of Law No. 7 17

When a trial judge fails to settle and approve statements of the evidence or proceedings and statements of corrections submitted to him by appellants for inclusion in appellants' Record for appeal pursuant to App. R. 9(C) and 9(E), and which statements and corrections are objected to by the appellee, and which statements and corrections are required by appellants to demonstrate the errors as stated in their assignments of error for their appeal, the court of Appeals cannot resolve disputes about the trial court's record

in the course of an appeal, and mandamus is the remedy for appellants to have the statements settled and approved by the trial judge for inclusion in their Record for appeal.

Authorities cited in support of Proposition of Law No. 7

Rule 9, Ohio Rules of Appellate Procedure 19
Knapp, et al v. Edward Laboratories, et al, 61 Ohio St2d 197, 400 N.E.2d 384 20
Edwards Motor Transit v. Public Utility Comm., 1 Ohio St3d, 437 N.E.2d 291 (1982) 21
State of Ohio v. Gentry 10 Ohio App3d 227, 461 N.E.2d 132 (1983) 21
Brookridge Party Center, Inc. v. Fisher Foods, Inc. 12 Ohio App3d 130, 468 N.E.2d 63 (1983) 21
Raack v. Bohine 17 Ohio App3d 15, 477 N.E.2d 1155 (1983) 21
In re Adoption of Foster, et al 22 Ohio App3d 129, 489 N.E.2d 1070 (1985) 21
Oriold v. Oriold 26 Ohio App3d 122, 498 N.E.2d 1086 (1985) 21
Maloney v. Maloney 34 Ohio App3d 9, 516 N.E.2d 253 (1986) 21
Rose Chevrolet, Inc. v. Adams 36 Ohio St3d 17, 520 N.E.2d 654 (1986) 21
City of Columbus v. Hodge 37 Ohio App3d 68, 523 N.E.2d 516 (1987) 21
Farmers Banking Co. v. Hinkle 46 OS2d 374, 75 O Op2d 448, 348 N.E.2d 717 22
State ex rel Atkins v. Todd 4 O 351 22
Hollister & Smith v. Judges of Dist. Court, 8 O.S. 201 22
State ex rel Ottenberger v. Hawes 43 O.S. 16, 1 NE 1 22

State ex rel Hartford F. Ins. Co. v. Weygandt, 123 O.S. 7, 8 O.L. Abs. 755, 173 N.E. 614 22
State ex rel Industrial Com. v. Day 136 O.S. 477, 26 N.E.2d 1014, 17 O Ops 86 22
Fox v. Dierkes 165 N.E. 745 22
Telling Belle Vernon Co. v. Krenz 34 O App 499, 7 O L Abs 9, 171 N.E.357 22
Fox v. Lynch 13 O L Abs 142 22
French v. Friesinger 38 N.E.2d 87, 34 O L Abs 506 22
Stefanowski v. Stefanowski 42 N.E.2d 917, 36 O L Abs 142 22
State ex rel State v. Flinn 1 O Dec Rep 551, 10 West L J 363 22
In State ex rel Turner Printing Machinery, Inc. v. Westropp 152 O S 386, 89 N.E.2d 578, 40 O Ops 395 22
Associated Estates Corp v. Fellows 11 O App3d 112, 463 N.E.2d 417 (Ohio App 1983) 22
Beebe, Judge v. State ex rel Starr Piano Co. 106 Ohio St 75, 139 N.E. 156 (1922) 23
Re W. T. Grant Co. v. Rodman 432 F Supp 105, (S.D. N.Y. 1977) 23A
In Treasure Imports v. Henry Amdur & Sons 127 F2d 3 (C.C.A.2d 1942) 23A
Motion Practice by Herr, Haydock & Stempl Little, Brown & Co. 23A1
Konigsberg v. The Lamports Co. 116 O.S. 640 23A3
State v. Parmenter 84 Ohio St 482, 95 N.E. 1155 23A3
Graham v. State 98 Ohio St 77, 120 N.E. 232, 18 A.L.R. 1272 23A3

Columbus v. City of Kenton 111 Ohio St, 145 N.E. 12 (1924) 23C
Henninger v. Davis 96 Ohio St 205, 117 N.E. 229 23C
Knowlson v. Bellman 160 O S 359, 116 N.E.2d 430 23D
4 O Jur3d, Sec. 392, Page 728 22

Proposition of Law No. 8 24
Under Appellate Rule 9(C) and 9(E) the failure of the trial judge to settle and approve statements of the evidence or proceedings and the statements of corrections submitted to him by appellant for inclusion in appellant's Record for appeal, and which statements and corrections are required by appellant to demonstrate the errors as stated in his assignments of error for his appeal, is a denial to appellant of the 'due course of law' as guaranteed to appellant by Art. I, Sec. 16 of the Ohio Constitution and is also a denial to appellant of the 'due process of law' and of the 'equal protection of the laws' as guaranteed to appellant by the Fourteenth Amendment to the Constitution of the United States.
Authorities cited in support of Proposition of Law No. 8
State of Ohio v. Render 43 Ohio St2d 17, 330 N.E.2d 690 24
Ford v. Ideal Aluminum 7 Ohio St2d 9, 218 N.E.2d 434 24
Crow v. Brite Metal Treating 9 Ohio St2d 63, 223 N.E.2d 595 24

Proposition of Law No. 9 25

When the Respondent files a Motion To Dismiss asking the court to dismiss for no cause of action an original action which had been filed in the Court of Appeals, a dismissal rendered the day after the filing of the Motion To Dismiss, and rendered without first affording the Relators an opportunity to receive by mail a copy of the Respondent's Motion To Dismiss and without first affording the Relators an opportunity for an oral hearing of said Motion To Dismiss or without first affording Relators an opportunity to file a Memorandum In Opposition to the Motion to Dismiss, pursuant to the Ohio Rules of Civil Procedure and pursuant to the local court rules, is a denial of the 'due course of law' as guaranteed to Relators by Art. I, Sec. 16, of the Constitution of Ohio and is also a denial of 'due process' and the 'equal protection of the laws' as guaranteed to Relators by the Constitution of the United States of America.

Authorities cited in support of Proposition of Law No. 9

Ohio Civil Practice by Klein, Browne, and Murtaugh Vol. I, T21.19, page 163 26

Schroeder v. New York City (1962) 371 U.S. 208, 9 L Ed2d 255,259, 83 S Ct, A.L.R.2d 1398 27

Armstrong v. Manzo (1965) 380 U.S. 545, 14 L Ed 62, 66, 85 S Ct 1187 27

CONCLUSION 28

PROOF OF SERVICE 30

APPENDIX vii

APPENDIX

APPEAL:
Notice of Appeal to the Supreme Court A1

DECISIONS:
Entry of Trial Court filed August 30, 1988 A2

Decision & Entry of Court of Appeals filed November 23, 1988 A3

CONSTITUTIONS:
O Const IV, §3 A10

O Const I, §16 A10

Constitution of the United States, Amendment XIV, Sec. 1 A11

STATUTES:
Title 42, Section 1983 A11

O.R.C. 2501.013 A12

O.R.C. 2501.02 A12

APPELLATE RULES:
Rule 8—Second District Local Rule A13

Rule 9—Ohio Appellate Rule A14

Rule 10—Ohio Appellate Rule A16

OHIO RULES OF CIVIL PROCEDURE:
Rule 7 A18

Rule 12 A19

Rule 15 A19

Rule 56 A19

RULES OF THE COMMON PLEAS COURT OF MONTGOMERY COUNTY:
Rule 2.09 A18

TABLE OF AUTHORITIES

CASES

In re Adoption of Foster, et al 22 Ohio App3d 129, 489 N.E.2d 1070 (1985) 21
Armstrong v. Manzo (1965) 380 U.S. 545, 14 L Ed 62,66, 85 S Ct 1187 27
Associated Estates Corp v. Fellows 11 O App3d 112, 463 N.E.2d 417 (Ohio App 1983) 22
Beebe, Judge v. State ex rel Starr Piano Co. 106 Ohio St 75, 139 N.E. 156 (1922) 23
Brookridge Party Center, Inc. v. Fisher Foods, Inc. 12 Ohio App3d 130, 468 N.E.2d 63 (1983) 21
City of Columbus v. Hodge 37 Ohio App3d 68, 523 N.E.2d 516 (1987) 21
Columbus v. City of Kenton 111 Ohio St, 145 N.E. 12 (1924) 23C
Crow v. Brite Metal Treating 9 Ohio St2d 63, 223 N.E.2d 595 24
Edwards Motor Transit v. Public Utility Comm. 1 Ohio St3d, 437 N.E.2d 291 (1982) 21
Farmers Banking Co. v. Hinkle 46 O S2d 374, 75 O Op2d 448, 348 N.E.2d 717 22
Ford v. Ideal Aluminum 7 Ohio St2d 9, 218 N.E.2d 434 24
Fox v. Dierkes 30 O App 486, 165 N.E. 745 22
Fox v. Lynch 13 O L Abs 142 22
French v. Friesinger 38 N.E. 2d 87, 34 O L Abs 506 22
Graham v. State 98 Ohio St 77, 120 N.E. 232, 18 A.L.R. 1272 23A3
Re W. T. Grant Co. v. Rodman 432 F Supp 105 (S.D. N.Y. 1977) 23A
Henninger v. Davis 96 Ohio St 205, 117 N.E. 229 (1917) 23C

Hollister & Smith v. Judges of Dist. Court 8 O S. 201 22
Knapp, et al v. Edwards Laboratories, et al 61 Ohio St2d 197, 400 N.E.2d 384 20
Knowlson v. Bellman 160 O S 359, 116 N.E.2d 430 23D
Konigsberg v. The Lamports Co. 116 O. S. 640 23A3
Maloney v. Maloney 34 Ohio App3d 9, 516 N.E.2d 253 (1986) 21
Oriold v. Oriold 26 Ohio App 3d 122, 498 N.E.2d 1086 (1985) 21
Raack v. Bohine 17 Ohio App3d 15, 477 N.E.2d 1155 21
Rose Chevrolet, Inc. v. Adams 36 Ohio St3d 17, 520 N.E.2d 654 (1986) 21
Schroeder v. New York City (1962) 371 U. S. 208, 9 L Ed2d 255, 259, 83 S Ct, 89 A.L.R.2d 1398 27
Stefanowski v. Stefanowski 42 N.E.2d 917, 36 O L Abs 142 22
State of Ohio v. Gentry 10 Ohio App3d 227, 461 N.E.2d 132 (1983) 21
State v. Parmenter 84 Ohio St 482, 95 N.E. 1155 23A3
State of Ohio v. Render 43 Ohio St2d 17, 330 N.E.2d 690 24
State ex rel Atkins v. Todd 4 O 351 22
State ex rel Hartford F. Ins. Co. v. Weygandt 123 O S 7, 8 O L Abs 755, 173 N.E. 614 22
State ex rel Industrial Com. v. Day 136 O S 477, 26 N.E.2d 1014, 17 O Ops 86 22
State ex rel State v. Flinn 1 O Dec Rep 551, 10 West L J 363 22

State ex rel Ottenberger v. Hawes 43 O S 16, 1 N.E. 1 22
State ex rel Reisman v. Cuyahoga County Board of Elections 331 N.E.2d 310 13
In State ex rel Turner Printing Machinery, Inc. v. Westropp 152 O S 386, 89 N.E.2d 578, 40 O Ops 395 22
State ex rel Westchester v. Bacon (1980) 61 Ohio St2d 42, 15 O O3d 53, 399 N.E.2d 81 13
Telling Belle Vernon Co. v. Krenz 34 O App 499, 7 O L Abs 9, 171 N.E. 357 22
In Treasure Imports v. Henry Amdur & Sons 127 F2d 3 (C.C.A.2d 1942) 23A

CONSTITUTION

Ohio Constitution, Art. IV, Sec. 3 5

STATUTES

O.R.C. 2501.013 5
O.R.C. 2501.02 5

RULES

Rule 9, Ohio Rules of Appellate Practice 15,19
Civ. R. 7(B)(2) 10
Civ. R. 12(B)(6) 8,12
Rule 2.09, Local Rule, Montgomery County Common Pleas Court 10

OTHER AUTHORITIES

Ohio Civil Practice, by Klein, Browne and Murtaugh 2, 10, 26
4 O Jur3d, Sec. 392, Page 728 22
Motion Practice, by Herr, Haydock and Stempl 23A1

NO. 90-214 (2)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

CHARLES A. FAHRIG and SHIRLEY A. FAHRIG,
Petitioners,

vs.

THE HONORABLE RICHARD S. DODGE, JUDGE,
COURT OF COMMON PLEAS,
MONTGOMERY COUNTY, OHIO,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

LEE C. FALKE, PROSECUTING ATTORNEY OF MONTGOMERY COUNTY, OHIO
ID #0003922

FRANCES E. McGEE-CROMARTIE,
Assistant Prosecuting Attorney
ID #0012044

PLEASE SERVE:

FRANCES E. McGEE-CROMARTIE,
Assistant Prosecuting Attorney,
301 West Third Street, Suite 50,
Dayton, Ohio 45402
Telephone: (513) 225-5773
ID #0012044

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	I
TABLE OF AUTHORITIES	II
STATEMENT OF THE CASE	1
COURSE OF PROCEEDINGS AND DISPOSITION BELOW	1
REASONS FOR DENYING THE WRIT	
The Petition for Writ does not present a substantial federal question under the circumstances of this case	3
CONCLUSION	4
APPENDIX	1a

TABLE OF AUTHORITIES

Page

Cases

Buckeye Candy & Tobacco Co., Inc. v. *Limbach*, 28 Ohio St. 3d 40, 41 (1986) 3

Budget Commission of Brown County v. *Village of Georgetown*, 24 Ohio St. 3d 33, 36 (1986) 3

Butner v. *United States*, 440 U.S. 48, 51 (1979) 3

Pacific Gas & Electric Co. v. *State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 214 (1983) 3

Pembauer v. *City of Cincinnati*, 475 U.S. 469 485, N. 13 (1986) 3

The American Restaurant & Lunch Co. v. *Glander*, 147 Ohio St. 147, 150, 70 N.E. 2d 93, 94 (1946) 3

United States v. *S.A. Empresa De Viacao Aerea Rio Grandense*, 467 U.S. 797, 815, N. 12 (1984) 3

NO. 90-214

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

CHARLES A. FAHRIG and SHIRLEY A. FAHRIG,
Petitioners,

vs.

THE HONORABLE RICHARD S. DODGE, JUDGE,
COURT OF COMMON PLEAS,
MONTGOMERY COUNTY, OHIO,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari to review the decisions of the Supreme Court of the State of Ohio.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This action was brought by Petitioners, Charles A. Fahrig and Shirley A. Fahrig, against the Honorable Richard S. Dodge, in the Court of Appeals for the Second Appellate District, Montgomery County, Ohio, seeking a Writ of Mandamus to compel said Judge to settle and approve certain motions they proposed. The Fahrigs had caused to be filed with

the Common Pleas Court of Montgomery County, Ohio, a legal malpractice action and the Honorable Richard S. Dodge, a Judge in the Common Pleas Court of Montgomery County, Ohio, the Judge to whom the case was assigned, overruled seven (7) of Petitioners' nine (9) motions. In response to the Petition for said Writ of Mandamus, Judge Dodge had filed a Motion to Dismiss the Complaint on the grounds that the Complaint did not state a claim upon which relief could be granted at App. of Pet. for Cert., p. A-28.

On November 23, 1988, the Court of Appeals granted Judge Dodge's Motion to Dismiss, finding that Petitioners did not meet the three (3) prong test for issuance of the Writ. Order at App. of Pet. for Cert., p. A-2. Petitioners then appealed the dismissal of their Complaint for a Writ of Mandamus to the Ohio Supreme Court. The Ohio Supreme Court dismissed the proceeding for failure to file in a timely manner, at App. of Pet. for Cert., p. A-1. Petitioners' Motion for a Rehearing on the matter denied at App. of Pet. for Cert., p. A-6. Petitioners then filed this Petition.

REASONS FOR DENYING THE WRIT

The Petition for Writ does not present a substantial federal question under the circumstances of this case.

Petitioners are seeking review of the Ohio State Supreme Court's decision which is pendant to any federal claims they may have had. In this case, the State Supreme Court dismissed Petitioners' case on the ground that their Brief was not timely filed. Petitioners were given until September 26, 1989, to file their Brief with the Ohio Supreme Court. (App. Res. Brief, p. 2.) Said Brief was not filed until October 18, 1989, at Pet. for Cert., p. 8. That decision should not be reviewed since it does not merit scrutiny from this Court. *Butner* v. *United States*, 400 U.S. 48, 51 (1979). It has been held that this Court defers to the lower courts in the interpretation and application of state law. *Pembauer* v. *City of Cincinnati*, 475 U.S. 469, 485, N. 13 (1986); *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense*, 467 U.S. 797, 815, N. 12 (1984); *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 214 (1983).

The State Supreme Court of Ohio has long held that "[w]here a statute confers the right of appeal, adherence to the conditions thereby imposed is essential to the enjoyment of the right conferred." *The American Restaurant & Lunch Co.* v. *Glander*, 147 Ohio St. 147, 150, 70 N.E. 2d 93, 94 (1946); *Budget Commission of Brown County* v. *Village of Georgetown*, 24 Ohio St. 3d 33, 36 (1986); *Buckeye Candy & Tobacco Co., Inc.* v. *Limbach*, 28 Ohio St. 3d 40, 41 (1986). One inherent condition of any appeal is that it be filed in a timely manner, this is a prerequisite to the perfection of any appeal. Petitioners failed to recognize this basic fact when they filed their Brief twenty-two (22) days after it was due. By failing to comprehend this important procedural factor, Petitioners firmly closed the door to any other review to which they may have been entitled.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to review the decision of the Ohio Supreme Court should be denied.

Respectfully submitted,

LEE C. FALKE, PROSECUTING ATTORNEY OF MONTGOMERY COUNTY, OHIO
ID #0003922

FRANCES E. McGEE-CROMARTIE
Assistant Prosecuting Attorney
ID #0012044

ATTORNEYS FOR RESPONDENTS

Please address all Communications to:

Frances McGee-Cromartie
Assistant Prosecuting Attorney
301 West Third Street, 5th Floor
Dayton, Ohio 45402
Telephone: (513) 225-5773

APPENDIX

IN THE SUPREME COURT OF OHIO

Appeal from the Court of Appeals
Second Appellate District
Montgomery County, Ohio

This case originated in the Court of Appeals

THE STATE OF OHIO ex rel
CHARLES A. FAHRIG and
SHIRLEY A. FAHRIG,
Relators-Appellants

v.

THE HONORABLE RICHARD S. DODGE, JUDGE
Respondent-Appellee

RELATORS-APPELLANTS'

MOTION TO FILE BRIEF INSTANTER

Charles A. Fahrig,
Shirley A. Fahrig,
27 Loganwood Drive,
Centerville, Ohio 45458
(513) 433-0546

Appearing Pro Suis as
Relators-Appellants

Maureen C. Newkold
Assistant Prosecuting Attorney
for Montgomery County, Ohio
Third Floor
Montgomery County Courts Bldg.
41 North Perry Street
Dayton, Ohio 45402
Telephone (513) 225-5757

Attorney for Respondent-Appellee

Relators-Appellants, by the within Motion To Allow Filing Of Relators-Appellants' BRIEF instanter, respectfully ask this Court for leave to file their BRIEF instanter.

MEMORANDUM

1. Relators-Appellants' Brief was due as-within-rule September 26, 1989.

2. Because Relator-Appellant had been summoned to serve as a Juror from September 5 through September 26, 1989, Relators-Appellants requested an extension to October 17, 1989, which this Court denied on October 4, 1989.

3. Relators-Appellants have filed on October 16, 1989, a Motion for Rehearing, Etc. as-within-rule and requesting reconsideration so that they may file their Brief Instanter.

Relators-Appellants respectfully ask that the within Motion be granted.

Respectfully submitted,

/s/ CHARLES A. FAHRIG

/s/ SHIRLEY A. FAHRIG,
27 Loganwood Drive,
Centerville, Ohio 45458
(513) 433-0546

PROOF OF SERVICE

A copy of the foregoing Motion To File Brief Instanter was mailed to Maureen C. Newkold, Montgomery County Courts Bldg., Dayton, Ohio 45402, by regular U.S. mail on October 18, 1989.

/s/ SHIRLEY A. FAHRIG

(3)

NO. 90-214

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

CHARLES A. FAHRIG and SHIRLEY A. FAHRIG,
Petitioners,

vs.

THE HONORABLE RICHARD S. DODGE, JUDGE,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OHIO

REPLY BRIEF OF PETITIONERS

CHARLES A. FAHRIG
SHIRLEY A. FAHRIG
27 Loganwood Drive
P. O. Box 522
Centerville, Ohio 45459
Telephone: (513) 433-0546
Petitioners, Appearing Pro Se

PREPARED BY PETITIONERS

10 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....ii

REPLY BRIEF (Four Parts)
PART I.....1
PART II.....1
PART III.....2
PART IV.....3

CONCLUSION.....6

TABLE OF AUTHORITIES

Page

CASES

Dehart v Aetna Life Insurance Co., 69 Ohio St2d 189, 23 Ohio Ops3d 210, 431 NE2d 644 (1982).....4

Hawkins v Marion Correctional Institute, 28 Ohio St3d 4, 501 NE2d 1195 (1986).....5

Lewis v Connor, 21 Ohio St3d 1.....5

Pembauer v City of Cincinnati, 475 US 469, 485, 486.....3

Perry v Perry, 7 Ohio App3d 318, 455 NE2d 689.....4

OHIO CONSTITUTION

O Const, Article IV, Section (B)(2)(a)(i).....2

No. 90-214

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

CHARLES A. FAHRIG and SHIRLEY A. FAHRIG,
Petitioners,

vs.

THE HONORABLE RICHARD S. DODGE, JUDGE,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OHIO

REPLY BRIEF OF PETITIONERS

I. In reply to Respondent's Statement of the Case, Petitioneers state that they sought a Writ of Mandamus to compel the trial judge to 'settle' and 'approve' proposed narrative statements of proceedings, and not to 'settle' and 'approve' certain motions as stated by the Respondent on pages 1 and 2.

II. On page 2 Respondent states that "The Ohio Supreme Court dismissed the proceeding for failure to file in a timely manner" and on page 3 of Respondent's Reason For Denying The Writ, Respondent further states that "One

inherent condition of any appeal is that it be filed in a timely manner, this is a prerequisite to the perfection of any appeal"

Petitioners' appeal was perfected in a timely manner on January 23, 1989 by the filing of their notice of appeal and payment of the filing fee pursuant to the Ohio Constitution, Art. IV, Sec. 2(B)(2)(a)(i) which reads as follows:

> **O Const IV Sec. 2 Supreme Court**
> (B)(2) The supreme court shall have appellate jurisdiction as follows:
> (a) In appeals from the courts of appeals as a matter of right in the following:
> (i) Cases originating in the courts of appeals;

Respondent cites three cases wherein an Ohio statute requires that a copy of the tax commissioner's report be appended to the notice of appeal in order for the appeal to be perfected.

There is no statute involved in Petitioners' case and the only requirement is the filing of a copy of the notice of appeal, previously filed in the Court of Appeals, together with the payment of the filing fee in order to have the appeal perfected. Petitioners' appeal was perfected on January 23, 1989.

III. Another reason which Respondent presents for denying Petitioners' Writ states on page 3 that:

> "the State Supreme Court dismissed Petitioners' case on the ground that the brief was not timely filed" and that "Petitioners were given until September 26, 1989 to file their Brief" and further, that "Said Brief was not filed until October 18, 1989."

Petitioners' reply by stating that on September 25, 1989 they timely filed a Motion entitled "Relators' Motion

To Extend Time With Attached Affidavit", requesting a three week extension to replace the previous extension of three weeks which time of three weeks was lost due to Petitioner Shirley A. Fahrig having to perform jury duty during the same period of time, namely September 5 through September 26. A copy of the jury summons was filed in the case and the court was therefore apprised of same.

Petitioners believed this request was reasonable and presented to the Court an unusual circumstance for granting a replacement extension of time so that Petitioners could perform their legal research at out of town law libraries which they are required to do since they are not permitted to use the local Montgomery County Law Library.

IV. Respondent on page 3 states that the Supreme Court dismissal "should not be reviewed since it does not merit scrutiny from this Court.." and that "this Court defers to the lower courts in the interpretation and application of state law." and cited *Butner v United States, Pembauer v City of Cincinnati, United States v S. A. Empresa De Viacao Aerea Rio Grandense,* and *Pacific Gas & Electric Co. v State Energy Resources Conservation and Development Commission.*

Butner, Etc., United States, Etc., and *Pacific Gas, Etc.,* supra, are federal court cases and have no application to this case since there is no interpretation and application of state statutes in Petitioners' case.

In *Pembauer v City of Cincinnati,* 475 US 469, 484, 485 (1986) this Court granted a Writ of Certiorari and found that Pembauer's Fourth and Fourteenth Amendment rights (Title 42, Section 1983) were indeed violated due to the county prosecutor making "a considered decision based on his understanding of the law."

Like Pembauer, these Petitioners are contending that their federal and state constitutional rights have been violated by the application of the rules in Petitioners' lawsuit - which application of the rules is applied differently as to other litigants.

The prevailing policy in Ohio is to hear cases on the merits. The Ohio Supreme Court, in *DeHart v Aetna Life Ins. Co.*, 69 Ohio St2d 189, 431 NE2d 644, stated as follows in its syllabus by the Court::

> "A court of appeals abuses its discretion when, after dismissing a case, *sua sponte*, for a minor, technical, correctable, inadvertent violation of a local rule, it refuses to reinstate the case when: (1) the mistake was made in good faith and not as part of a continuing course of conduct for the purpose of delay, (2) neither the opposing party nor the court is prejudiced by the error, (3) *dismissal is a sanction that is disproportionate to the nature of the mistake*, (4) the client will be unfairly punished for the fault of his counsel, and (5) *dismissal frustrates the prevailing policy of deciding cases on the merits*." (Emphasis added)

And, in *DeHart* at 193, the Ohio Supreme Court said:

> "Only a flagrant, substantial disregard for the court rules can justify a dismissal on procedural grounds."

And also in *DeHart* at 192, the Ohio Supreme Court said:

> "Judicial discretion must be carefully - and cautiously - exercised before this court will uphold an outright dismissal of a case on purely procedural grounds."

In *Perry v Perry* , 7 Ohio App3d 318, 455 NE2d 689, wherein the appellant tendered his brief with a motion

instanter 28 days late, the Court of Appeals for the Tenth Judicial District held in its Syllabus that:

> "Where there is no apparent prejudice to appellee resulting from the undue delay of appellant's failure to file a timely brief, *the interest of determining appeals upon their merits justifies the granting of appellant's motion to file his brief instanter out of rule*, so long as all costs of the action to date are assessed against him, regardless of the outcome of the appeal on the merits." (Emphasis added)

The Ohio Supreme Court, in *Hawkins v Marion Correctional Institute*, 28 Ohio St3d 4, 501 NE2d 1195 (1986) held that dismissing an appeal as a sanction for failing to file a brief is not automatic and is within court's discretion. *Hawkins*, supra, is replete with citations from the Ohio State Supreme Court decisions as to why it is the policy in Ohio to hear cases on the merits and emphatically states that judicial discretion must be carefully and cautiously exercised before the Supreme Court of Ohio will uphold the outright dismissal of a case on purely procedural grounds.

In yet another effort to apprise the bench and bar of the State of Ohio to the Supreme Court of Ohio's philosophy in reviewing procedural dismissals, the Supreme Court of Ohio rendered a unanimous opinion in *Lewis v Connor*, 21 Ohio St3d 1 (1986), wherein Justice Wright reiterated the Court's philosophy:

> "I briefly concur to draw the attention of the bench and the bar to the recent trend of cases emanating from this court which make it clear that when appropriate this court will construe the Ohio Rules of Civil Procedure and other rules to insure that controversies are decided on their merits rather than on overly technical applications of the rules which would lead to a dismissal."

The Supreme Court, in dismissing Petitioners' appeal, is clearly guilty of a gross abuse of judicial discretion. Petitioner Shirley A. Fahrig performed jury duty as required by law and these Petitioners should not be penalized by doing so.

CONCLUSION

The Ohio Supreme Court should have recognized the eighteen (18) copies of Petitioners' sixty (60) page Brief filed on October 18, 1989 which contained nine (9) Propositions of Law and citations of forty (40) cases and eight (8) additional citations of law. The Ohio Supreme Court should have recognized the loss of three (3) weeks of Brief research and preparation time due to the jury duty of three weeks. It is obvious that Petitioners performed considerable legal research for their cause. They were sincere in the presentation of their appeal on the merits to the Ohio Supreme Court. Petitioners' appeal should not have been dismissed on "purely procedural grounds". Furthermore, Petitioners' appeal could have been heard on the 'RECORD' as filed.

It is evident that Petitioners have not been afforded the same rights as afforded the litigants in the cases cited supra. The policy as expounded by the Supreme Court of Ohio of having cases heard on the merits and of not having cases dismissed on "purely procedural grounds" has not been accorded to these Petitioners to the deprivation of their state and federal constitutional rights.

Respectfully submitted,

CHARLES A. FAHRIG
SHIRLEY A. FAHRIG
27 Loganwood Drive
P. O. Box 522
Centerville, Ohio 45459
Telephone:(513) 433-0546
Petitioners, Appearing Pro Se